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CLERK OF DISTRICT COURT

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FILED

BY _____
DEPUTY

**MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD
COUNTY**

SANDY WELCH, Candidate

Applicant,

v.

LINDA MCCULLOCH, in her official
capacity as Secretary of State and secretary
of the Montana State Canvass Board,
**STEVE BULLOCK, MONICA J.
LINDEEN, AND DENISE JUNEAU**, in
their capacity as members of the Montana
State Canvass Board,

Respondents.

Cause No. DV-12-1369 C

STEWART E. STADLER

**VERIFIED APPLICATION
FOR MANUAL RECOUNT**

Applicant Sandra "Sandy" Welch, through this verified application, states
and alleges as follows for her claims for relief against the Respondents:

Cause of Action

1. This action is brought pursuant to Montana Code Annotated § 13-16-301, which allows "an unsuccessful candidate for any public office at an election [to] apply to the district court . . . for an order directing the county

recount board to make a recount of the votes cast in any or all of the precincts.”

Id. at 13-16-301(1)(a).

2. Applicant Sandy Welch was determined to be the unsuccessful candidate in the 2012 Montana election for Superintendent of Public Instruction. She here applies for a statewide recount.

Venue and Jurisdiction

3. Venue and jurisdiction are proper in this Court pursuant to Montana Code Annotated §13-16-301, which provides that

Within 5 days after the canvass of election returns, an unsuccessful candidate for any public office at an election may apply to the district court of the county where the election was held for an order directing the county recount board to make a recount of the votes cast in any or all of the precincts. If the election was held in more than one county, the application must be made to the district court of the county where the candidate resides.

MCA 13-16-301(1)(a).

4. Applicant filed this application within the 5-day statutory period. MCA 1-1-307 (allowing any act appointed by law to be conducted on the next business day if it falls on a holiday or Saturday); MCA 1-1-216(1)(a) (defining Sunday as a holiday). She seeks a recount of more than one county. And she resides in Flathead County. Thus, this Court has jurisdiction.

5. Jurisdiction over this matter remains with this Court until the cause is finally determined and the final count is made by the relevant recount boards.

MCA 13-16-304(2). Failure to be able to accommodate the statutory deadlines for a hearing or determining the application does not divest this Court of jurisdiction. *Id.*

Parties

6. Applicant Sandy Welch is a resident of Flathead County. She was a candidate for Superintendent of Public Instruction in the 2012 general election.

7. Respondent Linda McCulloch, Montana's Secretary of State, is statutorily charged with overseeing and executing the statutorily required procedures governing Montana elections. She is Montana's Chief Election Officer pursuant to Montana Code Annotated § 13-1-201. She is charged with duties relating to the State Canvassing Board and serves in the capacity as secretary to that Board. MCA 13-15-502.

8. Respondent Steve Bullock is Montana's current Attorney General. He is statutorily required to serve on Montana's State Canvass Board and is charged with determining the vote. MCA 13-15-502.

9. Respondent Monica J. Lindeen, Montana's State Auditor, is also statutorily required to serve on Montana's State Canvass Board and is charged with determining the vote. MCA 13-15-502.

10. Denise Juneau, Montana's current Superintendent of Public Instruction, is statutorily required to serve on Montana's State Canvass Board

and is charged with determining the vote. MCA 13-15-502. Ms. Juneau was Applicant Welch's opponent in the 2012 election and, as the candidate found to have been elected, is given special statutory consideration in these proceedings. She must be served a copy of the application, given an opportunity to be heard and present, and be represented at any recount. MCA 13-16-302.

Factual Background

11. On November 6, 2012, a general election was held in Montana.

12. Sandy Welch was a candidate for Superintendent of Public Instruction in the 2012 general election. Her opponent was candidate Denise Juneau. Both candidates appeared on the November 6, 2012, general election ballot.

13. The State Canvassing Board¹ met pursuant to 13-15-501 *et seq.* on November 27, 2012, to certify the results of the election.²

¹ The state canvass board is comprised of the State Auditor, the Attorney General, and the Superintendent of Public Instruction, with the Secretary of State serving as secretary. MCA 13-15-502. The November 27, 2012, meeting was not conducted by these individuals but instead by staff members. No provision that Applicant is aware of allows for such substitution.

² Each county canvass board is to submit its county's election results via certified mail to the state canvass board for statewide certification within 14 days of the general election. MCA 13-15-501. The Secretary of State is to contact any counties that fail to do this three days before the state canvass. 13-15-503. The state canvass board did not receive a complete copy of Custer County's results by November 27, 2012, but accepted a faxed copy of the results for its canvass. No provision that Applicant is aware of allows for the acceptance of faxed results. The state canvass board had 27 days, or until December 3, 2012, to complete the canvass. MCA 13-15-502.

14. The results of the state canvass were to declare Ms. Juneau the successful candidate, with Ms. Juneau receiving 235,397 votes and Ms. Welch receiving 233,166 votes, a difference of 2,231 votes or about .48 percent. *See 2012 Statewide General Canvass*, p. 9-1, available at http://sos.mt.gov/elections/2012/2012_General_Canvass.pdf.

Standard of Review

15. For a court-ordered recount application to be granted, this Court must determine that there is “probable cause to believe that the votes cast for the applicant or the ballot issue were not correctly counted.” MCA 13-16-301(4).

16. Probable cause is not defined in the recount or election law statutes, and is only otherwise used in Montana statutes in the criminal context. In the search and seizure context, “probable cause to search exists if the facts and circumstances within the officer's personal knowledge . . . are sufficient to warrant a reasonable person to believe that the suspect has committed an offense.” *State v. Stoumbaugh*, 157 P.3d 1137, 1142 (Mont. 2007) (citations omitted). The showing of a mere probability that a defendant committed the crime charged is sufficient for establishing probable cause to file a criminal charge. *State v. Renz*, 628 P.2d 644, 645 (Mont. 1981); *State v. Hamilton*, 605 P.2d 1121, 1127 (Mont. 1980). In determining probable cause, the district court may use common sense and draw permissible inferences, and its decision will

not be reversed absent abuse of discretion. *State v. Mason*, 941 P.2d 437, 439 (Mont. 1997).

17. Under this standard, Applicant must demonstrate to this Court that the facts and circumstances within her knowledge are sufficient to warrant a reasonable person to believe that the votes in the election race for Superintendent of Public Instruction were not properly counted. She need not show with absolute certainty that these errors occurred, but instead that the probability exists that they occurred. *Hamilton*, 605 P.2d at 1127.

18. The recount provisions also provide that “[i]f it appears from a verified application that the election judges failed to comply with the provisions of 13-15-206, that is sufficient cause for believing that the election judges did not correctly ascertain the number of votes cast for the applicant or ballot issue.” MCA 13-16-303. Thus, any showing that election judges failed to comply with the counting procedures in Mont. Code. Ann. § 13-15-206 presumptively established probable cause to justify a recount.

Grounds for Recount

19. A recount application must state the grounds for a recount and be verified by the candidate to be true to the best of the candidate’s knowledge, information, and belief. MCA 13-16-301(2).

20. To the best of Applicant's knowledge, information, or belief, the following statutory deficiencies in the following counties exist giving rise to the reasonable belief that votes for the candidates for Superintendent of Public Instruction were not properly counted:

Count I – The M650 Machines Make Tabulation Errors

21. Applicant incorporates and re-alleges each of the foregoing paragraphs as if fully set forth herein.

22. The ES&S Model 650 machines are used statewide as ballot counters and vote tabulators for absentee, mail-in, military, and provisional ballots. These machines are notoriously known for jamming. This was known even before the election and was witnessed in pre-election calibration tests in counties like Fergus County. The machines tabulate or partially tabulate the ballots that cause the jam. They are then reset, with the jammed ballot run again, resulting in that ballot being partially if not completely counted twice. In 13 precincts in Missoula County alone, 399 more votes were tabulated than there were paper ballots counted by the three M650 machines used there.

23. Of the 491,966 ballots cast, 288,778 are absentee ballots. *See Montana Voter Turnout*, Montana Secretary of State Website, *available at* http://sos.mt.gov/elections/Voter_Turnout/index.asp, *and Absentee Ballot*

Counts By County, Montana Secretary of State Website, available at <http://sos.mt.gov/elections/index.asp>.

24. Because of these widespread jamming errors, probable cause exists to believe that ballots ought to be manually counted statewide.

Count II-Election Judges Did Not Remake Ballots As Required By Law

25. Applicant incorporates and re-alleges each of the foregoing paragraphs as if fully set forth herein.

26. MCA 13-15-206(3)(b) states:

If the voting system cannot process the ballot because of the ballot's condition or if the voting system registers an unvoted ballot or an overvote, which must be considered a questionable vote, the entire ballot must be set aside and the votes on the ballot must be counted as provided in subsection (4).

27. MCA 13-15-206(4)(b) states:

If a ballot was set aside under subsection (3)(b) because it could not be processed by the voting system due to the ballot's condition, the counting board shall transfer all valid votes to a new ballot that can be processed by the voting system.

28. Throughout the state, election judges had problems running absentee ballots through the M650 machines due to jamming.

29. Rather than remake the absentee ballots on a new ballot and running that ballot through the machine as required by MCA 13-15-206(4)(b), election judges instead ran and re-ran the ballots until they were accepted.

30. In Fergus County, for example, election judges and poll watchers used sharpie markers and stickers to modify voted ballots so that the M650 machines would accept them. They continued with this process until 3:00 a.m. the morning following the election. This process, in addition to violating state law, creates the risk of error due to fatigue.

31. Because election judges failed to follow the requirements of 13-15-206(4)(b) by failing to themselves remake ballots, probable cause exists to justify manually recounting ballots statewide.

Count III – Election Judges Failed to Issue New Ballots to Correct Errors As Required By Law

32. Applicant incorporates and re-alleges each of the foregoing paragraphs as if fully set forth herein.

33. MCA 13-15-206(7) states that “The secretary of state shall adopt rules defining a valid vote and a valid write-in vote for each type of ballot and for each type of voting system used in the state.”

34. Under the Secretary of State’s election judge guidelines, a ballot on which a mistake is made is considered “spoiled” or “void” and must be put in the so-designated envelope, with the poll book marked accordingly, and the voter given another ballot. *Election Judge Handbook*, p. 77, available at http://sos.mt.gov/Elections/Officials/Forms/Election_Judge_Forms/2012_Election_Judge_Handbook.pdf.

35. The instructions on ballots expressly state "If you make a mistake or change your mind, exchange your ballot for a new one." *Election Administrator Handbook*, p. 22, available at http://sos.mt.gov/elections/Officials/Forms/Election_Administrators_Handbook_2.2011.pdf.

36. MCA 13-15-206(2)(a) states that "If a vote has not been cast according to instructions, the vote must be considered questionable and the entire ballot must be set aside and votes on the ballot must be handled as provided in subsection (4)."

37. Applicant is aware so far that in Beaverhead County, Missoula County, and Silver Bow County, election judges believed it proper to put stickers on ballots themselves to correct errors for voters rather than issuing new ballots.

38. Such ballots were not set aside as questionable but were promptly processed in violation of state law.

39. Applicant believes that such a practice was not unique to these counties, but was widespread throughout Montana.

40. Because election judges failed to follow the requirements of 13-15-206, probable cause exists to justify manually recounting ballots statewide.

Count IV – Election Judges Failed to Officially Stamp Ballots As Required By Law

41. Applicant incorporates and re-alleges each of the foregoing paragraphs as if fully set forth herein.

42. MCA 13-15-206(7) states that “The secretary of state shall adopt rules defining a valid vote and a valid write-in vote for each type of ballot and for each type of voting system used in the state.”

43. The Secretary of State Election Judge Handbook expressly states that “the words ‘Official Ballot’ shall be stamped” on ballots given to voters in accordance with MCA 13-13-116. *Election Judge Handbook*, p. 43, 44, available at http://sos.mt.gov/Elections/Officials/Forms/Election_Judge_Forms/2012_Election_Judge_Handbook.pdf.

44. In precincts 18E, 26D, and 26E of Cascade County, election judges did not officially stamp ballots used there. Thus, the election judges failed to follow statutory and administrative requirements for creating a valid ballot.

45. Because the election judges failed to follow MCA 13-15-206, probable cause to justify a manual recount in precincts 18E, 26D, and 26E exists.

**Count V—Election Judges Failed to Provide Official Ballots As Required By
Law**

46. Applicant incorporates and re-alleges each of the foregoing paragraphs as if fully set forth herein.

47. MCA 13-15-206(7) states that “The secretary of state shall adopt rules defining a valid vote and a valid write-in vote for each type of ballot and for each type of voting system used in the state.”

48. The Secretary of State Election Judge Handbook directs election judges to “[e]nter the name of the elector alongside the corresponding ballot number in the pollbook. The number in the pollbook must correspond with the number on the stub of the ballot given to the elector.” *Election Judge Handbook*, p. 43, 44, available at http://sos.mt.gov/Elections/Officials/Forms/Election_Judge_Forms/2012_Election_Judge_Handbook.pdf (citing MCA 13-13-115).

49. In Glacier County, election judges ran out of ballots and so gave voters photocopies of the ballots to fill out.

50. Photocopied ballots do not have unique ballot numbers nor the required stub with a unique ballot number. Thus, Glacier County judges could not comply with statutory and administrative procedures required to make create a valid ballot.

51. Because the election judges in Glacier County failed to comply with the requirements of MCA 13-15-206, probable cause to believe that the ballots in Glacier County were not properly counted exists.

**Count VI—Machines Had Software Errors That Were Allegedly Remedied
By Procedures Contrary to The Law**

52. Applicant incorporates and re-alleges each of the foregoing paragraphs as if fully set forth herein.

53. MCA 13-15-207 contemplates that vote counts are to “begin prior to the close of the polls, or immediately upon the closure of the polls.”

54. MCA 13-15-206 allows election administrators to “adopt policies to govern local processes” only so long as the policies “are consistent with the provisions of [Title 13]” and if they “provide for . . . (b) the time and place and public notice of each count or recount” and “(c) public observance of each count . . . including observance by representatives” of candidates.

55. In Lewis and Clark County, election day officials unilaterally reopened and conducted a manual recount on November 19, 2012, nearly two weeks after the election, for Senate District 9 due to software errors discovered after election day. Candidate Ripley, whose concerns about the vote count were had been dismissed by officials, was not informed of the recount until November 20, 2012, the day after the recount was completed.

56. Not only is such a recount unauthorized under Montana law and its processes contrary to MCA 13-15-206 and 13-15-207, that software errors occurred to prompt such a recount calls into question the accuracy of any results from those precincts, including those in Applicant's race.

57. Because software errors occurred in precincts 44, 45, and 46 of Lewis and Clark County and the election officials there failed to comply with the requirements of MCA 13-15-206 and 13-15-207, probable cause to believe that the ballots in those precincts were not properly counted exists.

Prayer for Relief

WHEREFORE, Applicant prays for the following relief:

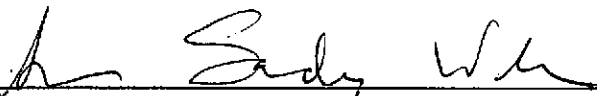
1. Within five days of the application's filing, that this Court conduct a hearing to determine the sufficiency of the application, MCA 13-16-301(3);
2. That after conducting a hearing, this Court issue an order that directs all election board administrators to conduct a statewide recount to begin within five days of the order, at a time and places fixed by the Court, MCA 13-16-301(4);
3. That this Court determine in its order the probable expense of making the recount pursuant to MCA 13-16-307 and afford Ms. Welch 48 hours to post the deposit with this Court;

4. That this Court direct the Secretary of State to notify each of the 56 Election Administrators and their respective County Recount Boards to conduct a manual recount in strict compliance with MCA 13-16-412 and to provide public notice of the same;
5. That Applicant or her representative be permitted to witness each recount in a meaningful way pursuant to MCA 13-16-411(2) by being close enough to see the votes cast in her race on each ballot and to hear discussions of whether votes will be counted and why;
6. That Applicant or her representative be permitted to challenge a recount board's decision to count or not count a particular ballot or group of ballots and receive a copy of any challenged ballots or other election day materials upon request;
7. That at the conclusion of the recount, this Court set a hearing at which Applicant may present any challenges she may have regarding ballots that were counted or failed to be counted;
8. That at the conclusion of the hearing and any resulting order, all Election Administrators re-submit to the State Canvass Board their certified results pursuant to that order and otherwise consistent with Mont. Code Ann. § 13-16-418;

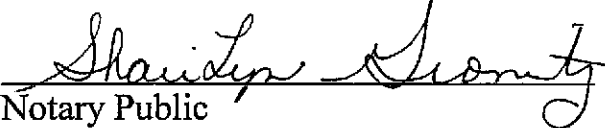
9. That the State Canvass Board be directed to reconvene when it has received certified results from all 56 counties to re-canvass the final results pursuant to Mont. Code Ann. § 13-16-419;
10. That Applicant's deposit be refunded pursuant to MCA 13-16-307(2) in the event it is determined that she is the rightful winner of the Superintendent of Public Instruction election;
11. That this Court provide any other, further relief as the Court deems just and proper.

I, Sandra Welch, under penalties of perjury, state as follows:

That I have read the above application for recount and verify that the facts and matters set for therein are true to the best of my knowledge, information, and belief.


Sandra "Sandy" Welch

Subscribed and sworn before me this 3rd day of December, 2012.


Notary Public

My Commission Expires:

Apr 7, 2013

County of Residence:

Flathead



SHARILYN GRONITZ
NOTARY PUBLIC - MONTANA
Residing at Martin City, Montana
My Comm. Expires Apr. 7, 2013

Dated: December 3, 2012

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on December 3, 2012.



Duncan Scott